



## **Agricultural Marketing Service**

### **7 CFR Part 800**

**[Doc. No. AMS-FGIS-19-0062]**

**RIN 0581-AD90**

### **Exceptions to Geographic Boundaries**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule sets forth a process by which applicants for official grain inspection services (applicants) may request a service exception, allowing an official agency (OA) to cross boundary lines and perform services outside of its assigned geographic area. While four exception types are authorized in the United States Grain Standards Act (USGSA or Act), this final rule focuses on two: the inability to provide services in a timely manner and the nonuse of service from the OA assigned to the applicant's geographic area (assigned OA). This final rule establishes a three-tiered system under which applicants can request a one-time, 90-day, or long-term timely service exception due to untimely service issues. This rule provides that nonuse of service exception requests must be preceded by ninety days without service from the assigned OA. This final rule further amends the regulations to provide criteria the Federal Grain Inspection Service ("FGIS" or "the Service") will use to review, validate, and determine whether to grant service exception requests. This final rule also establishes a process that allows an assigned OA to challenge requests for service exceptions. Finally, this rule provides for FGIS review to ensure the validity of requests.

**DATE:** Effective [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Karla Whalen, Director, Quality Assurance and Compliance Division, Federal Grain Inspection Service, AMS, USDA: telephone: (202) 720-7312, email: FGISQACD@usda.gov.

**SUPPLEMENTARY INFORMATION:** Under the USGSA (7 U.S.C. 71 *et seq.*), each OA that is designated to provide inspection and weighing services in the United States is assigned a specific geographic area where it performs such services for applicants within that geographic area (7 U.S.C. 79(f)(2)(A)). This ensures effective and efficient delivery of official services to applicants within the assigned OA's geographic area and enhances the orderly marketing of grain. The USGSA also provides that applicants may obtain inspection and weighing services from another OA (gaining OA) under certain circumstances. OAs may cross geographic boundaries to provide services to applicants if: (1) the assigned OA is unable to provide inspection services in a timely manner (timely service exception); (2) the applicant has not been receiving official inspection services from the assigned OA (nonuse of service exception); (3) the applicant requests a probe inspection on a barge-lot basis; or (4) the assigned OA agrees in writing with the adjacent OA to waive the current geographic area restriction at the applicant's request (7 U.S.C. 79(f)(2)(B)). The regulations at 7 CFR 800.117 provide further clarification for requesting these exceptions.

### **Background on the Nonuse of Service Exception**

In the past, under a nonuse of service exception, an applicant who had not obtained official inspection or weighing services from the assigned OA for a specified length of time could obtain services from another designated OA. Over time, the procedural variance on whether a request for nonuse of service exceptions was approved or not caused concern for applicants and OAs.

In 2015, Congress eliminated the nonuse of service exception from the USGSA.<sup>1</sup> FGIS subsequently removed that exception provision from the regulations in 2016.<sup>2</sup> As a result, FGIS terminated existing nonuse of service exceptions. However, in 2018, Congress reinstated authority to allow a nonuse of service exception through an amendment to the USGSA in the 2018 Farm Bill.<sup>3</sup> The 2018 Farm Bill directed USDA to allow for restoration of the terminated nonuse of service exceptions, where appropriate. Interested parties were given an opportunity to submit restoration requests to FGIS, as described in a Notice to Trade published on March 5, 2019.<sup>4</sup>

The amended USGSA also provides that the nonuse of service exception may only be terminated if all parties to the exception jointly agree on the termination. This means that the applicant, the assigned OA, the gaining OA, and FGIS must agree to terminate the exception. Such provision ensures all parties are aware of the change and the assigned OA will resume providing service to the applicant.

On April 1, 2020, FGIS published an advanced notice of proposed rulemaking<sup>5</sup> to solicit industry comments on how FGIS should amend its criteria for reviewing, approving, and implementing exceptions to the USGSA's requirements for geographic boundaries. FGIS received responses from six commenters. FGIS sought to incorporate industry feedback from the advanced notice of proposed rulemaking, along with input received during industry meetings, to develop a proposed rule, which was published on August 19, 2021.<sup>6</sup> FGIS requested comment on proposed options for timely service and nonuse of service exceptions. Particularly, FGIS sought input from industry participants, who use, and OAs, who provide, official services and are familiar with grain inspection

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<sup>1</sup> 7 USC Ch. 3 Grain Standards; January 1, 2016.

<sup>2</sup> 81 FR 49855; July 29, 2016.

<sup>3</sup> 7 USC Ch. 3 Grain Standards December 11, 2020.

<sup>4</sup> <https://www.ams.usda.gov/content/restoring-certain-exceptions-us-grain-standards-act>; accessed 08/10/2022.

<sup>5</sup> 85 FR 18155; April 1, 2020.

<sup>6</sup> 86 FR 46606; August 19, 2021.

services under the USGSA. FGIS received comments from four entities. This final rule includes the AMS review and consideration of those comments on this process.

#### **Amended Exception Provisions: Inability to Provide Timely Service**

Applicants may request a timely service exception when service is not timely. Service is not timely when the assigned OA cannot provide the requested official services within 6 hours of request or cannot provide the results and certificate in accordance with 7 CFR 800.160(c). The applicant must submit a request for a timely service exception to FGIS. The applicant may make this request orally or in writing. If the applicant orally requests a timely service exception, the applicant must submit a written request to the Service within two business days after the oral request. The applicant must clearly state and support the identified reason for the requested exception.

Applicants may also request an exception for delays caused by weather events or requests for official services that are not offered by the assigned OA, as they would not be able to offer such services in a timely manner. Thus, for the inability to provide timely service, FGIS intends to grant a timely service exception when: (1) the assigned OA is unable to provide official services to an applicant within 6 hours; (2) or the assigned OA is unable to provide results and certificates in accordance with 7 CFR 800.160(c); or (3) a request for official services not offered by the assigned OA would result in an inability to receive timely service; or (4) a weather event or other short term disruption impacts the ability of an assigned OA to provide timely service; with consideration that granting an exception is in the best interest of the official system.

This final rule implements a tiered application process for requesting exceptions when an assigned OA is unable to provide timely service. The first tier is a one-time, timely service exception. In this instance, a one-time exception to use another official agency (gaining OA) may be allowed for applicants that have a pending service request that meets the timely service exception criteria. The second tier is a 90-day timely

service exception due to the assigned OA's inability to provide timely service. If, after the first-tier one-time, timely service exception request is granted, a second instance occurs in which an assigned OA is not able to provide timely service within 180 days of the first instance, the applicant may request a 90-day exception. In this instance, a 90-day exception to use the gaining OA may be allowed. Lastly, the third tier is a long-term timely service exception due to the repeated inability of the assigned OA to provide timely service. If there is another occurrence within 365 days of the applicant's return to the assigned OA after their 90-day timely service exception period has expired, the applicant may request a long-term exception, extending until the termination date of the gaining OA's designation. Along with the required data to support their timely service exception request, the applicants may elect to send any supporting documentation they feel would aid in the agency's determination process. FGIS will then review and verify the accuracy and thoroughness of each package.

If the applicant has an urgent timely service exception request, outside of the Service's customary business hours, an OA from outside the geographic area may provide one-time service. When providing an urgent service, the gaining OA must provide written notification to the Service within two business days after service. Upon returning to official office hours, FGIS will review and verify the circumstances of the urgent request, as well as its consistency with the USGSA and implementing regulations.

For 90-day and long-term timely service exception requests, FGIS will have a determination review period. Once the applicant has provided all required information, FGIS will notify the applicant and begin reviewing the service exception request. FGIS will make every attempt to issue a determination within 15 business days of receipt for 90-day and long-term timely service exceptions, barring a challenge from the assigned OA. To challenge a 90-day or long-term timely exception, the assigned OA must submit the challenge and any supporting documents within 14 calendar days of the date of

notification of the exception request. The challenge and supporting documentation must clearly identify the objection to the exception request and support the identified reason for the challenge. While awaiting a final decision on 90-day and long-term timely service exceptions, the applicant may receive service from the potential gaining OA.

FGIS will provide its decision in writing to the assigned OA, the applicant, and the potential gaining OA. The assigned OA may challenge a request for a timely service exception for any reason. To challenge a request for a timely service exception, the assigned OA must object, in writing, and submit the challenge and any supporting documents to FGIS within 14 calendar days.

If an applicant submits a request for a timely service exception that FGIS determines to be false or misleading, FGIS will not grant the exception and may elect to limit the applicant from submitting further requests for a period of up to 180 days. If an urgent request for a timely service exception, outside of customary business hours, was granted on the basis of a false or misleading request, FGIS may deny the applicant from future urgent timely service exceptions for a period of up to 180 days.

The applicant maintains the option of returning to the assigned OA within 60 days of notification of termination of the timely service exception to all parties. The applicant must submit a written notification requesting to terminate the exception to FGIS, the assigned OA and the gaining OA. The exception will be cancelled, and future exception requests must be considered at the beginning of successive-tiered system.

If FGIS determines that the assigned OA's inability to provide a specific service is limited due to weather events or the issue of service availability has been resolved, FGIS, in consultation with all the parties, may terminate the 90-day or long-term exception. If FGIS terminates a timely service exception, the applicant, the assigned OA, and the gaining OA, will be notified in writing, via any written form to include email or autogenerated response, and the applicant will resume service with the assigned OA

within 60 days of notification. However, if the existing exception was associated with the assigned OA's inability to provide service in 6 hours or less, or with timely issuance of the results and certificate, FGIS might elect not to terminate the exception. During the duration of exceptions caused by a failure of the assigned OA to supply timely service, this exception period gives assigned OAs an opportunity to improve.

#### **Amended Exception Provisions: Nonuse of Service Exceptions**

For nonuse of service exception requests, this rule defines the period of nonuse as 90-days prior to application for a nonuse of service exception. The rule defines areas of inquiry but does not limit factors FGIS will take into consideration when reviewing requests for nonuse of service exceptions. These considerations include: (1) the location of the service need(s); (2) the impact of expanding the applicant/customer base for the gaining OA; (3) the types of services requested by the applicant and offered by the assigned OA; (4) whether the applicant has ever utilized the official system (i.e., a facility that has never used the official system before may not qualify for nonuse of service exception, nor may a facility that is under new ownership by a company with no history of use of the official system); and (5) the impact on the applicant in the event it continues services with the assigned OA.

For a nonuse of service exception request, FGIS intends to grant an exception when: (1) the applicant has not received service from the assigned OA within the established time period, (2) the applicant submits, to FGIS, its request for a nonuse of service exception, and (3) granting an exception is in the best interest of the official system. FGIS will notify the assigned OA in writing upon receipt of the request for a nonuse of service exception. At the completion of the process, FGIS will issue written notification of the determination on the request to the applicant, the assigned OA, and the gaining OA.

If an applicant submits a request that FGIS determines is false or misleading, FGIS will not grant the nonuse of service exception and may elect to limit the applicant from submitting further requests for a period of up to 180 days.

A nonuse of service exception will remain in place during the period of the gaining OA's designation. At the end of the designation, FGIS will review current information concerning the exception. Unless the applicant, the assigned OA, the gaining OA, and FGIS request to terminate the exception, the FGIS will renew the exception for the gaining OA's new designation period, if applicable. In the event the gaining OA is no longer designated, the exception will automatically terminate, and the applicant will return to the assigned OA. If the applicant transfers ownership of its facility, the exception will automatically terminate, and the new applicant/owner of the facility must request a new nonuse of service exception, if it wishes to receive service from an OA other than the assigned OA for that geographic area. At any point in the designation cycle, if the applicant, the assigned OA, the gaining OA, and FGIS agree to terminate the nonuse of service exception, FGIS will terminate the exception. In this case, the assigned OA must resume service within 60 days of notification.

FGIS recognizes there may be instances where granting an exception may impact the assigned OA. For example, in some cases, the cost of the equipment necessary to provide the requested service is more than the assigned OA would be able to recoup, due to the infrequency of the requests for such a special service. Therefore, as stated in the proposed rule, FGIS is establishing a challenge process for requested nonuse of service exceptions. The timeline for the challenge initiates when FGIS notifies the assigned OA of the requested nonuse of service exception. FGIS will consider factors provided by an assigned OA in such challenge. Requests for a challenge must state and support the identified reason for the challenge. FGIS may request additional documentation to support the challenge.



## **Comment Summary and Analysis**

AMS received a total of four comments on the proposed rule, one from a State department of agriculture OA and three industry associations. While generally supportive, three of the commenters offered suggestions for improving or clarifying processes.

*Comment:* One commenter expressed support and congratulated FGIS on the overall nature of the proposed rule. The commenter noted that multiple revisions to the OA boundary exception provisions of the USGSA and the FGIS regulations had created uncertainty among both applicants and OAs for some time. The commenter suggested that the proposed rule would accomplish FGIS's goal to create a clear, consistent, and fair framework for considering and granting exceptions for customer needs and offered no concerns or suggestions.

*Comment:* Comments from two associations recommended additional procedural changes. The commenters urged FGIS to develop a template for submitting exception requests due to an inability to provide timely service and nonuse of service. The commenters stated that the template should outline the necessary information for FGIS to review and process the request, as well as identify the persons at FGIS and the respective OAs that should receive the application. The commenters also suggested that such template should be available online.

Further, the commenters recommended that FGIS and the assigned OA be required to acknowledge receipt of the request and determine, within 12 hours, whether services can be provided by an alternate OA. The commenters noted that although the proposed rule states that an applicant can notify FGIS verbally or in writing to request a service exception, it does not offer an alternative contact in the event the applicant cannot reach a live person. Commenters recommended FGIS provide a secondary contact option. The commenters also recommended that the point of contact at the grain

handling facility requesting the service exception should be notified by verbal and written communication regarding the decision on the request.

*AMS response:* In 2023, FGIS will create a web page with instructions and templates for requesting designation service exceptions due to the inability to provide timely service and nonuse of service. For one-time, timely service exception requests, if the request is made during customary business hours, FGIS will provide its decision that day. FGIS will acknowledge receipt of the request in writing, via any written form to include email or autogenerated response. Notably, the newly designed regulations allow applicants to proceed with one-time urgent timely service exception requests outside of business hours without prior approval from FGIS to avoid a delay in the marketing of grain.

Since urgent timely service exception requests submitted outside of business hours can proceed without prior approval, AMS determined it is not necessary to provide a second point of contact in the regulations. Further, the request template is to be submitted to a group recipient office inbox monitored by multiple staff. FGIS will make every effort to issue its determination for 90-day and long-term timely service exceptions within 15 business days, barring a challenge from the assigned OA. To ensure the applicant's receipt of service is not delayed, it may utilize the potential gaining OA while awaiting a final determination from FGIS.

Regarding exception requests for nonuse of service, AMS has determined not to include a 12-hour response time for such requests because of the 14-day challenge period that has been established for the assigned OA to challenge the exception request and the time required for the FGIS to review the matter. AMS intends to reconcile appropriate FGIS directives in conjunction with the release of this rule. However, AMS has included wording in the regulations that addresses the timeline.

*Comment:* An association asked AMS to explain, in the final rule or in the FGIS Directive, who within the agency is responsible for reviewing exception applications and whether applications would be reviewed by more than one office.

*AMS response:* 7 CFR 800.0(b) clarifies that the Federal Grain Inspection Service is referred to in the regulations as the “Service.” The Service administers the regulations pertaining to Federal grain inspection, including those established by this final rule. The request template will not further define the FGIS representative responsible for receiving these requests as FGIS organizational structure and staffing responsibilities can change rapidly. This also ensures no undue external pressure is placed on an individual staff member while allowing for AMS executives to be consulted and apprised of individual situations. FGIS may have other offices involved in decision making, as appropriate. FGIS contact information is available on the FGIS website.

*Comment:* An association commented that, in some cases, an assigned OA can be delayed in providing timely service due to weather conditions over which it has no control. The commenter recommended that FGIS take this factor into consideration and “not penalize the OA if there is another request from the same grain handling facility for a different reason.”

*AMS response:* FGIS acknowledges that some situations requiring timely service exceptions may be temporary and out of the control of the assigned OA. Accordingly, FGIS will consider relevant factors related to the reason(s) for the inability to provide timely service during the decision-making process. As stated in the proposed rule, the long-term exceptions may be cancelled by FGIS, in consultation with the parties, if the issue that caused the lack of timely service has been addressed

*Comment:* A commenter recommended that nonuse of service exceptions should be strictly limited to situations where the OA is unable to provide the service requested by the facility in a timely manner. The commenter asserted that allowing the requesting

facility to receive a nonuse of service exception for the sake of convenience or other arbitrary or subjective reasons undermines the integrity of the grain inspection system, as well as the purpose behind the designated geographic boundaries. The comment supported adding a challenge process to review newly requested and previously issued nonuse of service exceptions. This commenter provided specific situational details regarding four elevators.

*AMS response:* FGIS concurs that requests for exceptions should be evidence-based and provide the assigned OA an opportunity to demonstrate the ability to deliver timely service. The process takes this need into account through a variety of factors in the revised evaluation criteria that governs how exception requests will be determined. Regarding the commenter's reference to the four applicants that elected to return to out-of-State service providers, those applicants were allowed to revert back to those service providers based on their previously approved nonuse of service exceptions that were reinstated in accordance with amendments to the USGSA.

*Comment:* A State department of agriculture comment suggested AMS further clarify the definition of "period of nonuse as 90 days" in the proposed rule. The commenter also asked AMS to specify what factor determines the start of the 90-day period. The comment further suggested that 120 days would be a more reasonable period for defining nonuse, explaining that 120 days would give the assigned OAs sufficient time to resolve staffing or equipment deficiencies, which, according to the comment, have become more challenging in the last 18 months.

*AMS response:* FGIS will require an applicant to demonstrate, through documentation, the last date of official inspection service from the assigned OA. FGIS also believes that a period of 90 days nonuse is reasonable and sufficient for establishing a period of nonuse, prior to submission of a nonuse of service exception request and accounting for review time. As a point of reference, the proposed rule stated that the

feedback on the number of days without official service (for nonuse of service exceptions) had a wide range, from 30 to 180 days. As stated in the advanced notice of proposed rulemaking, prior ranges allowed were between 90 to 180 days in length. A period of 90 days is within timeframes used for the nonuse of service exceptions in the past and is a compromise based on timeframes suggested in the public comments. FGIS also considered that during the time it takes FGIS to review the request, the applicant must continue with nonuse of service, so the period of nonuse will extend beyond the applicant's original 90 days of nonuse. Due to the strictly defined timely service exceptions criteria, FGIS believes most applicant issues will be satisfied under that category. Allowing this full nonuse of service time period enables the assigned OA additional time to work out any service difficulty with its customer. Applicant requests that meet the requirements of timely service exceptions, may be handled under the timely service exception tiers.

### **Executive Orders 12866 and 13563**

Executive Orders 12866 – Regulatory Planning and Review, and 13563 – Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, harmonizing rules, and promoting flexibility.

This action has been determined to be not significant for the purposes of Executive Order 12866, as supplemented by Executive Order 13563. The final rule is not expected to create any new material costs for industry.

### **Baseline**

Under the USGSA, the USDA regulates the inspection of barley, canola, corn, flaxseed, mixed grain, oats, rye, sorghum, soybeans, sunflower seed, triticale, and wheat. This rule impacts the 41 OAs that provide USDA-regulated grain certification and the over 5,000 commercial entities they serve. In FY2021, OAs performed 3,150,029 grain inspections of 257.8 million metric tons of grain. Based on current data, FGIS expects fewer than one percent of the entities served by OAs to request and be granted exceptions under the two types of exceptions detailed in this rule.

Official inspection costs represent a very small percentage of the total value of grain shipments. In 2021, FGIS calculated the weighted average costs for inspections for different carriers as follows: \$18.68 for a semi-truck capable of carrying 58,000 pounds, \$30.75 for a railcar capable of carrying 220,000 pounds, and \$316.90 for a barge capable of carrying 3,000,000 pounds of grain. For example, if the price of wheat was \$8 for a 60-pound bushel, the cost of the inspection would represent 0.24% of the revenue for a truck load, 0.11% of the revenue for a railcar load, and 0.08% of the revenue for a barge load of wheat.

### **Need for the Rule**

Federally regulated grain inspection is designed to remedy two competing sources of market failure – asymmetric information and market power – while preserving the ability of small producers to access markets. This rule increases the flexibility of the existing inspection program without affecting the program’s quality standards or the ability of small sellers to access inspection services. The rule’s greater flexibility in allowing producers to obtain inspection services, however, will save costs and provide them greater ability to meet potential market opportunities and inspection challenges.

Many agricultural products, including grain, vary in important quality characteristics due to both farm production decisions and idiosyncratic factors. In the absence of a quality verification process, sellers in a transaction may have more

knowledge of a product's quality than buyers, a condition called asymmetric information. Akerlof (1978) showed asymmetric information can cause economic inefficiencies in which producers forego investments that are less costly to implement than the benefit they provide consumers<sup>7</sup>. Third-party inspection that verifies a product's quality resolves this source of market failure.

Grain inspectors certify the protein content, kernel size, and other quality factors related to product's market value to simplify transactions. Since the outcome of grain inspections directly affects the sale price, biases and inconsistencies in inspection methods might potentially redistribute the gains to trade from seller to buyer, or vice versa. Market power might exacerbate biases and inconsistencies if, for instance, large sellers or buyers can influence the outcome of quality inspections in their favor. In addition to fairness concerns, such opportunistic behavior creates economic inefficiencies by reducing the returns on investment in quality improvement and creating costs for downstream producers (i.e., bakers and food processors) expecting products of certain quality.

Domestic grain inspection is an optional service. When information asymmetries are a concern, inspection facilitates simpler, more rapid, and less risky transaction of final product. By allowing producers to recoup the costs of quality improvement, grain inspection also encourages investment in quality improvement.

Under its regulatory authority, the USDA approves grain inspection standards and monitors their uniform application by OAs in a variety of ways, including inspection sample review, fee schedule approvals, and periodic OA audits. To promote a competitive market for grain in which all producers have access to inspection services, FGIS requires that OAs provide inspection services to all producers in an assigned area

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<sup>7</sup>Akerlof, George A. "The market for "lemons": Quality uncertainty and the market mechanism." *Uncertainty in economics*. Academic Press, 1978. 235-251.

and regulates marketing fee schedules charged by OAs for these services. FGIS approves rates to cover various labor, laboratory, and travel costs and only approves differential rates across geographic areas if the underlying costs differ across assigned regions. For this reason, FGIS does not expect this rule to impact the price paid by inspection users or the fees received by OAs. Instead, FGIS expects this rule will allow the small fraction of inspection users who need timely service and nonuse of service exceptions greater flexibility in obtaining inspections services to meet immediate business requirements.

### **Benefits and Costs of the Rule**

FGIS assesses the economic benefits of this rule as being three-fold. First, the rule provides clarity to grain inspection applicants (e.g., producers, elevators, merchandisers, etc.), as well as OAs, regarding the terms under which exceptions are granted. Second, the rule increases the options to producers, elevators, merchandisers, etc., who require inspection services to market their grain. FGIS expects that this option will be utilized by fewer than one percent of applicants who need inspections services, quickly, but face service constraints by OAs. Third, the rule may heighten attention to service issues among OAs that have received nonuse of service exception requests. The validation process FGIS will establish and maintain to review all exception requests will ensure all granted requests are in the best interest of the official system and confirm an exception will not undermine the congressional policies in Sec. 2 of the USGSA . OAs may offer additional services, such as a broader range of testing, as a result.

FGIS does not ascribe any direct compliance costs to either OAs or producers as a result of the potential increase for timely service and nonuse of service exceptions under this rule. FGIS does not expect that the inspection fees it approves will change as a result of this rule. To the extent that this rule provides greater flexibility to how applicants can obtain inspection services, it will provide improved services or reduce total costs to producers by, for instance, allowing those needing immediate inspections to get them



from an OA other than the one to which they are assigned. Moreover, FGIS does not believe the rule will create significant indirect costs, aside from the minor costs to market participants learning the rule and documenting exception requests.

To the extent that some OAs conduct fewer inspections because applicants in their assigned area have requested more exceptions, other OAs will conduct more inspections. FGIS believes that any business losses to an OA will be small and that any losses will be offset by gains to other OAs. This rearrangement of business activity constitutes a transfer of benefits from one OA to another and has a neutral effect on total costs and benefits of the rule.

To summarize, FGIS believes that the total impact of the rule on the grain inspection industry is not economically significant and that the benefits of this rule exceed its costs, which are negligible.

### **Regulatory Flexibility Analysis**

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires agencies to consider the impact of their rules on small entities and to evaluate alternatives that would accomplish the objectives of the rule without unduly burdening small entities when the rules impose a significant economic impact on a substantial number of small entities. This rule has an economic impact on farms selling grain that require inspections (classified under North American Industry Classification System, or NAICS, codes 111110, 111120, 111130, 111140, 111150, 111191, 111160, 111191, and 111199), grain elevators and grain certifiers that conduct post-harvest crop activities (NAICS code 115114) and either require or perform inspections. The Small Business Administration considers grain farms to be small if their sales are less than \$1 million and grain elevators and grain certifiers (OAs) to be small if their sales are less than \$30 million (13 CFR 121.201).

The AMS Administrator certifies that this rule does not have a significant economic impact on small businesses. This determination is made based on the expectation that any small entities requiring grain inspection, including grain farms and grain elevators, or entities performing grain inspection, including OAs, will see neither a change in prices paid or fees charged nor a loss in access to inspection services or change in territorial boundaries for which they can perform inspections. Further, FGIS believes the new challenge process addresses the concern that some small OAs may lose economic viability when exceptions are granted to applicants under the exceptions to geographic boundary requirement. Finally, AMS does not believe that OAs qualifying as small business will be any more likely to be subject to exception requests than those OAs not qualifying as small businesses

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988 – Civil Justice Reform. This rule is not intended to have retroactive effect. The USGSA provides in sec. 87g that no State or subdivision thereof may require or impose any requirements or restrictions concerning the inspection, weighing, or description of grain under the Act.

This rule will not preempt any State or local laws, regulations, or policies, unless they represent an irreconcilable conflict with this rule. No administrative proceedings would be required before parties could file suit in court challenging the provisions of this rule.

#### **Executive Order 13175**

This rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government- to-government basis on: (1) Policies that have Tribal implications, including regulations, legislative comments or proposed legislation; and (2) other policy statements

or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

AMS has assessed the impact of this rule on Indian Tribes and determined that this rule will not have Tribal implications that require consultation under Executive Order 13175. AMS hosts a quarterly teleconference with Tribal leaders where matters of mutual interest regarding the marketing of agricultural products are discussed.

Information about the proposed changes was shared during the quarterly call on July 22, 2021, and Tribal leaders were informed about the proposed revisions to the regulation and the opportunity to submit comments. AMS received no questions or requests for additional information or outreach. If requested, AMS will provide additional support and information.

#### **Congressional Review Act**

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this final rule as not a major rule as defined by 5 U.S.C. 804(2).

#### **Paperwork Reduction Act and E-Government Act**

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), there are no information collection and record keeping requirements implications associated with this rule. Should any changes become necessary, they will be submitted to OMB for approval.

USDA is committed to complying with the E-Government Act (44 U.S.C. 3601 *et seq.*) by promoting the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

#### **List of Subjects in 7 CFR Part 800**

Administrative practice and procedure, Exports, Grains, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, AMS amends 7 CFR part 800 as follows:

## **PART 800 – GENERAL REGULATIONS**

1. The authority citation for part 800 continues to read as follows:

**Authority:** 7 U.S.C. 71-87k.

2. Amend § 800.117 by:

- a. Adding paragraph (b) introductory text;

- b. Revising paragraph (b)(1);

- c. Redesignating paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4),

respectively; and

- d. Adding a new paragraph (b)(2).

The additions and revisions read as follows:

### **§ 800.117 Who shall perform original services.**

\* \* \* \* \*

(b) *Exceptions for official agencies to provide service.* Under an exception, an official agency may provide service to an applicant outside of their geographic area. The Service may grant exceptions in instances when: the assigned official agency is unable to provide inspection services in a timely manner; a person requesting inspection services in that geographic area has not been receiving official inspection services from the official agency for that geographic area; a person requesting inspection services in that geographic area requests a probe inspection on a barge-lot basis; or, the assigned official agency for that geographic area agrees in writing with the adjacent official agency to waive the current geographic area restriction at the request of the applicant for service.

Excluding requests for probe inspections on a barge-lot basis, applicants requesting an exception must submit requests for a service exception to the Service.

(1) *Timely service.* Service is not timely when an official agency cannot provide the requested official services within 6 hours or cannot provide the results and certificate in accordance with § 800.160(c). Timely service exception requests will also be considered for delays caused by weather events or for official services that the assigned official agency does not offer. The applicant must submit a request for a timely service exception to the Service. The applicant may make this request orally or in writing. If the applicant requests a timely service exception orally, the applicant must submit a written request to the Service within two business days of the request. The applicant must clearly state and support the identified reason for the requested timely service exception. There are three consecutive tiers of timely service exceptions: one-time, 90-day, and long-term. Applicants requesting 90-day or long-term timely service exceptions must progress through each previous tier sequentially. The Service will review timely service exception requests and may contact the applicant, the assigned official agency, or potential gaining official agency with questions during its review.

(i) *One-time.* In the case of an assigned official agency's inability to provide timely service, an applicant may be granted a one-time approval to use another official agency for the associated pending service request, as applicable.

(A) For one-time, timely service exception requests, if the request is made during customary business hours, the Service will provide its decision that day.

(B) If the applicant has an urgent timely service exception request, outside of the Service's customary business hours, an official agency from outside the geographic area may provide one-time service. When providing an urgent service, the gaining official agency must provide written notification to the Service within two business days after service.

(C) Upon returning to official office hours, the Service will review and verify the circumstances of the urgent request, as well as its consistency with the U.S. Grain Standards Act and implementing regulations.

(ii) *90-day*. If there is an occurrence of untimely service within 180 days of the date of the occurrence in paragraph (b)(1)(i) of this section, the applicant may request a 90-day timely service exception. This 90-day window will begin the day the exception is granted.

(iii) *Long-term*. If there is an occurrence of untimely service within 365 days after the applicant's return to service with the assigned official agency, following an exception granted under paragraph (b)(1)(ii) of this section, the applicant may request a long-term timely service exception. When granting this exception, the Service may continue the exception up to the date on which the gaining official agency's designation terminates.

(iv) *Supporting documentation*. The applicant must submit a request for a timely service exception to the Service. This request may include any associated supporting documentation the applicant feels is warranted. After receipt of the request, the Service will provide the applicant, assigned official agency, and potential gaining official agency an opportunity to submit any additional information in support of the timely service exception request in writing. The Service will request additional information, if needed.

(v) *Review and verification*. Except as provided in paragraph (b)(1)(i) of this section, prior to granting a timely service exception, the Service must review and verify information submitted with the request. When a timely service exception request is received, the Service will issue a written notification to acknowledge the receipt of the request to the applicant, the assigned official agency, and the potential gaining official agency. When possible, the Service should also attempt to make oral contact.

(vi) *Timeline.* Once the applicant's request is received, the Service will notify the applicant and begin the review timeline. The Service will issue a determination within 15 business days for 90-day and long-term timely service exceptions, barring a challenge from the assigned official agency. While awaiting a final decision on 90-day and long-term timely service exceptions, the applicant may receive service from the potential gaining official agency.

(vii) *Notification.* The Service must notify the assigned official agency in writing upon receipt of the request for a timely service exception. At the completion of the request review process, the Service will issue written notification of the determination on the request to the applicant, the assigned official agency, and the gaining official agency. When possible, the Service should also attempt to make oral contact.

(viii) *Challenge.* The assigned official agency may challenge a request for a timely service exception for any reason. To challenge a request for a timely service exception, the assigned official agency must object, in writing, and submit the challenge and any supporting documents to the Service.

(A) Given the urgency of a one-time service request, if the assigned official agency wishes to challenge the request, it must be done in a manner which does not further delay the applicant from receiving the pending service. If the one-time timely service exception has already been granted or used, the assigned official agency may still challenge the Service's determination within 14 calendar days.

(B) To challenge a 90-day or long-term timely service exception, the assigned official agency must submit the challenge and any supporting documents within 14 calendar days of the date of notification of the timely service exception request. The documents must clearly identify the objection and support the identified reason for the challenge.

(ix) *Determination.* In the event the Service determines that the assigned official agency is unable to provide official services in a timely manner, the Service will grant a timely service exception.

(x) *False or misleading requests.* If an applicant submits a request for a timely service exception that the Service determines to be false or misleading, the Service will not grant the exception and may elect to limit the applicant from submitting further requests for a period of up to 180 days. If an urgent request for a timely service exception, outside of customary business hours, was granted on the basis of a false or misleading request, the Service may deny the applicant from future timely service exceptions for a period of up to 180 days.

(xi) *Return to the assigned official agency.* The applicant maintains the option of returning to the assigned official agency within 60 days of notification of termination of the timely service exception to all parties. The applicant must submit a written notification requesting to terminate the timely service exception to the Service, the assigned official agency and the gaining official agency. The timely service exception will be cancelled, and future timely service exception requests must be considered at the beginning of successive-tiered system.

(xii) *Termination.* If the Service determines the assigned official agency's inability to provide a specific service was limited due to weather events or for official services that the assigned official agency does (did) not offer, the cause of which has been resolved, the Service, in consultation with all the parties, may terminate the 90-day or long-term timely service exception. However, if the timely service exception was associated with the official agency's inability to provide service in 6 hours or less, or with its failure to issue the results and certificate in a timely manner, then the Service might elect not to terminate the timely service exception. The Service must notify the applicant, the assigned official agency, and the potential gaining official agency of all timely service



exception termination decisions in writing. The assigned official agency must resume service within 60 days of notification.

(2) *Nonuse of service exception.* If an applicant has not received official inspection services from the assigned official agency within the last 90 days, the applicant may request, in writing, a nonuse of service exception. Periods of nonuse resulting from timely service exceptions will not qualify as part of a period of nonuse.

(i) *Supporting documentation.* Along with the request for an exception, the applicant must submit supporting documentation pursuant to paragraph (b)(2)(i)(A) of this section and may submit any additional supporting material the applicant wishes to submit to the Service. After receipt of the request, the Service will provide the applicant, assigned official agency, and potential gaining official agency an opportunity to submit any additional information in writing. The Service will request additional information, if needed.

(A) *Required information.* The applicant's request for a nonuse of service exception must include the following information:

- (1) The last date of service from the assigned official agency;
- (2) The reason service has not been received during this time frame; and
- (3) The identified reason for the request.

(B) *Additional relevant information.* Applicants may submit any additional relevant supporting information. This may include, but is not limited to:

- (1) The location of the specified service need(s);
- (2) The types of services requested by the applicant and offered by the assigned official agency;
- (3) The ability of the assigned official agency to provide the requested service;
- (4) Whether the applicant's facility has ever used the official system; and

(5) The impact on the applicant in the event it continues with the assigned official agency.

(ii) *Review and verification.* The Service will review the request for a nonuse of service exception and supporting documentation, then conduct any necessary analysis to estimate the exception's impact prior to making a determination, as defined in paragraph (b)(2)(vi) of this section. When the Service receives a nonuse of service exception request, the Service will issue a written notification to acknowledge the receipt of the request to the applicant, the assigned official agency, and the potential gaining official agency.

(iii) *Timeline.* The Service will make every attempt to complete the determination process in a timely manner, during which the applicant must continue with nonuse of service. This time period will include the allotted 14 calendar days in which the assigned official agency may challenge the request. The Service may extend the determination timeline when necessary.

(iv) *Notification.* The Service must notify the assigned official agency in writing upon receipt of the request for a nonuse of service exception. At the completion of the process, the Service will issue written notification of the determination on the request to the applicant, the assigned official agency, and the gaining official agency. When possible, the Service should also attempt to make oral contact.

(v) *Challenge.* The assigned official agency may challenge a request for a nonuse of service exception for any reason. To challenge a nonuse of service exception, the assigned official agency must object in writing and must submit the challenge and any supporting documentation to the Service within 14 calendar days from the date of notification from the Service of receipt of the request for a nonuse of service exception for the applicant. The documents must clearly identify the objection and support the identified reason for the challenge.

(vi) *Determination.* The Service will consider impacts on the applicant, the assigned official agency, and the potential gaining official agency when deciding whether to grant a nonuse of service exception. These impacts may include, but are not limited to, the viability of the assigned official agency given the loss of business. The Service will also consider the impact on the official system and confirm a nonuse of service exception will not undermine the congressional policies in section 2 of the United States Grain Standards Act. The Service will provide its decision, in writing, to the applicant, the assigned official agency, and the potential gaining official agency. If approved, the applicant can receive service from either the originally assigned official agency or the gaining official agency.

(vii) *False or misleading requests.* If an applicant submits a request that the Service determines is false or misleading, the Service will not grant the nonuse of service exception and may elect to limit the applicant from submitting further requests for a period of up to 180 days.

(viii) *Renewal or termination of exception.* The nonuse of service exception is for the period of the gaining official agency's designation. At the end of the designation, the Service will review the nonuse of service exception and verify the information. Unless the applicant, the assigned official agency, the gaining official agency, and the Service all agree to terminate the nonuse of service exception, the Service will renew the nonuse of service exception for the gaining official agency's new designation period. In the event the gaining official agency is no longer designated, the nonuse of service exception will automatically terminate, and the applicant will return to the assigned official agency. If the applicant transfers ownership of its facility, the nonuse of service exception will automatically terminate, and the new applicant/owner of the facility must request a new nonuse of service exception to receive service from an official agency other than the assigned official agency for that geographic area. At any point in the designation cycle,

if the applicant, the assigned official agency, the gaining official agency, and FGIS jointly agree to terminate nonuse of service exception in writing, the Service will terminate the exception. In this case, the assigned official agency must resume service within 60 days of notification that the nonuse of service exception has been terminated.

(ix) *Historic exceptions.* All nonuse of service exceptions that were in place as of March 30, 2019, and that are currently active as of the date of effectuation of this rule, are incorporated within the list of active nonuse of service exceptions.

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